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APPENDIX.

In the Supreme Court of the United States

OCTOBER TERM, ~~1968.~~ 1969

No. ~~1185.~~ 66

ANGHEL GOLDSTEIN, aka Andrei Pietraru,
IULIU NASTA, aka Julius Nasta and
GHEORGHE FUNDI,
on behalf of themselves and all others similarly situated,
Appellants,

vs.

JOSEPH A. COX and SAMUEL DiFALCO,
Surrogates of the County of New York,
EDWARD F. SILVER,
Surrogate of the County of Kings,
CHRISTOPHER C. McGRATH,
Surrogate of the County of Bronx,
JOHN T. CLANCY,
Surrogate of the County of Queens,
ARTHUR LEVITT,
State Comptroller,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK.

Jurisdictional Statement Filed March 11, 1969.
Probable Jurisdiction Noted April 28, 1969.

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No. 66 Civil 4487.

In the United States District Court

SOUTHERN DISTRICT OF NEW YORK.

ANGHEL GOLDSTEIN,
Also Known as Andrei Pietraru,
IULIU NASTA,
Also Known as Julius Nasta and
GHEORGE FUNDI,
On behalf of themselves and all others
similarly situated,
Plaintiffs,

vs.

JOSEPH A. COX and S. SAMUEL DiFALCO,
Surrogates of the County of New York,
EDWARD S. SILVER,
Surrogate of the County of Kings,
CHRISTOPHER C. McGRATH,
Surrogate of the County of Bronx,
JOHN T. CLANCY,
Surrogate of the County of Queens,
ARTHUR LEVITT,
Comptroller of the State of New York,
Defendants.

RELEVANT DOCKET ENTRIES.

Dec. 28-66. Filed complaint and issued summons.

Jan. 13-67. Filed pltffs' affdvt. & notice of motion to convene a 3-judge court, etc.—ret. 1-17-67.

Feb. 24-67. Filed affdvt. of Daniel M. Cohen in opposition to motion to convene 3 judge court.

Mar. 1-67. Filed reply affdvt. of John R. Vintilla (filed in court).

Apr. 5-67. Filed Opin. on #33,387—Motion to convene a three-judge court is denied. Pltffs motion for preliminary injunction is also denied. So ordered-McLean, J. mailed notice.

Apr. 25-67. Filed pltffs' notice of appeal—mailed copy to Louis J. Lefkowitz.

May 29-67. Filed certification of record on appeal.

Aug. 10-67. Filed deft's Answer.

Oct. 18-67. Filed USCA order affirming the order of the U. S. District Court. Judgment entered—Clerk (mailed notice).

Mar. 28-68. Filed True copy of Order and Opinion of USCA that the order of said District Court is reversed and that the action be and it hereby is remanded for further proceedings in accordance with the opinion of this court—Judgment entered 3-28-68 Clerk—ent. 3-28-68 m/n.

Mar. 28-68. Filed copy of Order of Supreme Court of U. S.—Ordered that the judgment of this court of Sept. 27, 1967 and the mandate issued thereunder be and they hereby are vacated and that the appellants shall recover from the appellees one hundred dollars $100.00 for their costs in the Supreme Court of the U. S. docketed as judgment #69,219 on March 28, 1969 m/n.

Apr. 1-68. Filed Pltff. Notice of Motion for Summary Judgment ret. 4-23-68 and affdvt. of John R. Vintilla.

June 7-68. Filed Order—Designation of Judges—Having been notified by the Hon. E. C. McLean USDJ for the So. Dist. of N. Y. that an application has been filed in the above matter for relief pursuant to Title 28 US Code Sec. 2281, pursuant to Title 28 U. S. Code Section 2284 I hereby designate the following judges, in addition to the Hon. Edward C. McLean, to hear and determine said cause as provided by law: Hon. Irving R. Kaufman, U. S. Circuit Judge, and Hon. Chas. H. Tenney, U. S. Judge for the Southern District of New York. It is hereby ordered that this order be filed in the above entitled cause

in the said District Court—J. Edward Lumbard Chief Judge, U. S. Court of Appeals for the Second Circuit m/n.

June 14-68. Filed Affdvt. and Notice of Motion ret. 6-20-68 10:30 A.M. for an order granting leave to the law firm of Wolf Popper Ross & Jones to file briefs amicus curiae and to permit amicus curiae to participate in the oral argument of the within appeal, etc. (Wolf Popper Ross Wolf & Jones).

June 14-68. Filed Order—Pltffs. Motion for summary judgment will be heard before the court of 3 judges on June 25, 1968 10 A.M. Room 1106. All briefs in support of and in opposition to the motion shall be served and filed not later than 6-20-68. The parties shall fully comply with Rule 25 of the Gen. Rules of this Court—So ordered—McLean, J. m/n.

June 17-68. Filed Notice of Three Judge Court composed of Hon. Irving R. Kaufman, U. S. Circuit Judge the Hon. Charles H. Tenney and the Hon. Edward C. McLean, U. S. District Judges. re: that an order dated June 11, 1968 made by the Hon. Edward C. McLean, a hearing has been set for the 25th day of June, 1968, 10 A.M. Room 1106 U. S. Dist. Court—Clerk John J. Olear, Jr.

June 19-68. Filed Deft. Opposing Affdvt. (Daniel M. Cohen) in opposition to the motion made by the law firm of Wolf Popper Ross Wolf & Jones "to file briefs amicus curiae and to permit said amicus curiae to participate in the oral argument of the within appeal, etc. The motion dated June 14, 1968 has been made ret. 6-20-68.

June 20-68. Filed Brief on behalf of Amicus Curiae Wolf Popper Ross Wolf & Jones.

June 20-68. Filed Brief of Plaintiffs in support of motion for Summary Judgment.

June 21-68. Filed Defts. Supplemental Opposing Affdvt. of Attorney General in opposition to motion for summary judgment which is ret. 6-25-68.

June 25-68. Before Hon. Irving R. Kaufman, U. S. Circuit Judge, Before Hon. Edward C. McLean, U. S. District Judge, Before Hon. Charles H. Tenney, U. S. District

Judge, Non-Jury—Hearing Begun and concluded—De
sion reserved.

June 28-68. Filed transcript of record of proce
ings—June 25, 1968.

Dec. 20-68. Filed transcript of record of proce
ings—June 25, 1968.

Dec. 20-68. Filed Opinion #35452, Three-jud
Court, Before Kaufman, Circuit Judge, McLean, D.J. a
Tenney, D.J. denying plaintiffs motion for summary ju
ment. So ordered.

COMPLAINT IN THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK.

(Filed December 28, 1966; title omitted in printing.)

Plaintiffs, complaining of the defendants, allege:

1. The jurisdiction of this Court is invoked un
Title 28, United States Code, Section 1331, and also un
Title 28, United States Code, Section 2281, being a s
in equity to challenge the constitutionality of Section 26
of the New York Surrogate's Court Act and the pol
predicated on the authority of such statute, and to enj
the enforcement of the statute on the ground that it v
lates the rights secured to the plaintiff and others si
larly situated under the Constitution of the United Sta
and that the Statute infringes upon the exclusive powe
the Federal Government over foreign affairs, as here
after more fully appears.

2. The Surrogate's Court Act, Section 269-a, provi
as follows:

> "Where it shall appear that a legatee, distributee
> beneficiary of a trust would not have the benefit
> use or control of the money or other property
> him, or where other special circumstances mak
> appear desirable that such payment should be wi
> held the decree may direct that such money or ot

property be paid into the surrogate's court for the benefit of such legatee, distributee, beneficiary of a trust, or such person or persons who may thereafter appear to be entitled thereto. Such money or other property so paid into court shall be paid out only by the special order of the surrogate or pursuant to the judgment of a court of competent jurisdiction."

Surrogate's Court Act, Section 269-a(1).

3. Plaintiffs are nationals of Romania, and are residents and domiciled in said state. They bring this action on behalf of themselves and all other residents of Romania, similarly situated with respect to the matters here involved. They are so numerous as to make it impracticable to bring them all before the Court. There being identical or same questions of law and fact, a common relief being sought as will hereinafter more fully appear, plaintiffs bring this action as a class suit, pursuant to Rule 23(a) of the Federal Rules of Civil Procedure:

4. The defendants, Joseph A. Cox, S. Samuel DiFalco, Edward S. Silver, Christopher C. McGrath, John T. Clancy are the duly elected, qualified and acting judges of the Surrogate's Courts of New York, Kings, Bronx and Queens Counties, respectively.

5. The defendant, Arthur Levitt, is the duly appointed, qualified and acting Comptroller of the State of New York, and that as such officer he has in his possession and/or under his control, funds belonging to plaintiff, Iuliu Nasta, and other residents of Romania. That he has refused and continues to refuse to honor the claim of and to pay the funds belonging to the plaintiff, Iuliu Nasta, and continues to refuse to honor the claim of any Romanian national, on the basis of the existing policy of the state of New York not to effect payments to residents of certain Eastern European Countries including Romania, and that he refuses to make any payments until such time as those who are entitled to said payment are without the jurisdiction of Romania.

6. That the Surrogates of Bronx and New York counties have ordered the withholding of distribution to the plaintiffs, Anghel Goldstein and Gheorghe Fundi, distributees of the estate of Maurice Siegel, File No. 687 A—1950, and Jerotheos Stavrou, File No. P. 3152—1963, without notice or any opportunity to be heard, and solely because of the existing policy of the State of New York prohibiting the transfer of the funds to residents of Romania. It is the practice of these Surrogate-defendants in the settlement of the final account of an executor or administrator, to withhold the sum payable to a legatee or distributee in Romania and to order it deposited in court pursuant to Section 269-a of the Surrogate's Court Act.

7. The public policy of the State of New York governing the payment of the distributive shares of residents in Romania in decedent's estates, is predicated upon Section 269-a of the Surrogate's Court Act, and has been sustained by the Court of Appeals of New York in the Matter of Greenberg, motion for leave to appeal denied, December 30, 1965, 17 N. Y. 2d, 417, 46 Misc. 2d, 383, 24 App. Div. Rep. 2d, 435.

8. On February 19, 1951, the United States Treasury Department, pursuant to the authority vested in it by P. L. No. 828, Section 5, 54 Stat. 1036, 31 U. S. C. A., Section 123, issued Treasury Circular 655, listing twelve countries, including Romania, to which the forwarding of public funds, such as social security benefits and veteran's pensions, was prohibited. The Treasury Department concluded, therefore, that with respect to checks or warrants drawn against funds of the United States in favor of a Romanian national, local conditions in Romania were such that there was not a reasonable assurance that a payee in that country would actually receive payment or be able to negotiate the check or warrant for full value, Title 31, Section 211.3(a).

9. On March 30, 1960, an agreement relating to financial questions was concluded at Washington, D. C. between the governments of the United States and of

Romania. By virtue thereof, Romania was removed from the proscribed list of the United States Treasury Department of countries to which federal funds may not be transmitted, and furthermore, all federal regulations of a blocking nature regarding Romanian nationals were removed, 31 C. F. R. Section 211.2 (a), 25 Federal Regulations, pages 3456, 3526. The present official policy of the United States regarding payment of funds to persons resident in Romania, is set forth in the United States Treasury Regulation 655, as amended in April 1960, and now declares that there is a reasonable assurance that a payee in that area will actually receive checks or warrants drawn against funds of the United States, and will be able to negotiate them for full value. That ever since April of 1960, the United States has been remitted checks and warrants representing social security benefits, veterans pensions and other public funds to residents in Romania without any problem or difficulty as to the receipt, and use and control thereof by the recipient.

10. The policy of the State of New York, as applied to the residents of Romania, as hereinabove set forth, encroaches upon and impairs the effective exercise of the power to conduct foreign relations which is constitutionally vested in the Federal Government to the exclusion of the State of New York.

11. The authoritative conclusion by The Treasury Department of the United States that a reasonable assurance exists that a payee in Romania will actually receive the funds remitted to him and will be able to negotiate checks or warrants for full value, and the consequent transfer of public funds to residents in Romania since April of 1960, constitutes official Federal policy, and therefore, the policy of the State of New York in withholding distribution to heirs, legatees or beneficiaries in Romania is in direct conflict with and in violation of, and must give way to overriding federal policy.

12. That Section 269-a of the Surrogate's Court Act of New York, as applied by these defendants to the rights of

these plaintiffs and other residents of Romania, deprives them arbitrarily of their distributive shares, and constitutes an unconstitutional governmental interference without due process of law in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

13. Defendants have established and are maintaining a policy and practice of denying residents of Romania their distributive shares, otherwise secured to them, solely, because of their place of residence, and that such practice unlawfully discriminates against the plaintiffs and others similarly situated of the equal protection of the laws guaranteed them by the Fourteenth Amendment insofar as the statute is applied only because of their place of residence.

14. That the defendants Surrogates and others have been withholding the distributive shares belonging to residents of Romania, pursuant to the aforementioned public policy of New York, for more than fifteen years, and the amount being withheld is in excess of one half million dollars.

15. Many of the plaintiffs and others similarly situated are in dire need and/or aged and desperately in need of these funds. A delay in ascertaining and determining the rights of the plaintiffs, and others similarly situated and affected, on whose behalf this suit is brought, will result in further denial and deprivation of their rights in the indefinite future by reason of the acts herein complained of. There is no other remedy afforded by law or statute against the illegal acts and conduct of the defendants, save the equity powers of this Court, and unless the relief prayed for is granted.

WHEREFORE, plaintiffs pray that a three judge court be convened, pursuant to Title 28 U. S. C., Section 2281, and for the following relief:

1. That this Court enter a judgment or decree declaring that the policy and practice of the defendants in denying these plaintiffs and others similarly situated the right to their distributive shares from decedent's estates and to

other funds to which they are entitled on account of their residence in Romania is a denial of the rights secured to them by the Fifth and Fourteenth Amendments to the United States Constitution and, therefore, unconstitutional and void.

2. That Section 269-a of the Surrogate's Act of New York, as applied by the defendants to the rights of these plaintiffs and others similarly affected, be declared unconstitutional.

3. That this Court issue a permanent injunction forever restraining and enjoining the defendants and each of them, their agents and employees, from denying plaintiffs, and others similarly situated the right to their distributive shares from decedents' estates, and to other funds to which they may be entitled; that the defendants, and each of them, their agents, and employees, be ordered and directed to take such action as shall be necessary to deliver the distributive shares and other funds which are due and owing to and being withheld from these plaintiffs and others similarly situated.

4. That pending the final hearing and determination of this complaint upon its merits, the Court issue a preliminary injunction, restraining the defendants and each of them, their agents, and employees, from denying the plaintiffs, and others similarly situated, the right to their distributive shares and other funds to which they may be entitled.

5. For such other and further relief which this Court may deem proper.

MOTION FOR SUMMARY JUDGMENT WITH AFFIDAVIT IN THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK.

(Filed April 1, 1968; title omitted in printing.)

Plaintiffs move the court as follows:

1. That it enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, a summary judgment in plaintiffs' favor for the relief demanded in the complaint on the ground that there is no genuine issue as to any material fact and that plaintiff is entitled to a judgment as a matter of law; and, especially, in the light of *Zschernig v. Miller*, 36 L. W. 4120 (1/15/68), decided by the Supreme Court of the United States.

The Affidavit of John R. Vintilla is attached hereto in support of this motion.

JOHN R. VINTILLA,
EMANUEL ESCHWEGE,
NOVAK N. MARKU,
Attorneys for Plaintiffs.

AFFIDAVIT OF JOHN R. VINTILLA.

STATE OF OHIO,
COUNTY OF CUYAHOGA, SS.

John R. Vintilla, being duly sworn, says:

1. He is one of the attorneys for the plaintiffs herein.

2. That he has handled and appeared in similar matters wherein the rights of romanian nationals were involved throughout the United States.

3. The policy of the State of New York, which plaintiffs challenge as unconstitutional, is accurately set forth by the following:

a.) Defendant, Edward Silver, Surrogate of King's County, in his reply of October 15, 1965 (Appendix III annexed hereto) to a request addressed to him by an heir

in Romania for the release and immediate payment of his distributive share in the modest amount of $2,989.63 (R. Reply Affidavit of John R. Vintilla), wrote, pertinent hereto, as follows:

"I have given serious consideration to your letter of August 28, 1965, in which you request the release of your distributive share in the above estate. It is the public policy of the State of New York to withhold distribution to legatees who would not have the benefit or use or control of their bequest. The Appellate Courts of this State have held that residents of Rumania are within this description. As a Judge of the Surrogate's Court, I am bound by the ruling of the higher court, and as an individual I am in full agreement with it. Accordingly, and despite my personal desire to help you because of your advanced age, physical infirmity and need for the money, I must advise you that if formal application for the payment of your bequest in full is made to me, I would be constrained to deny the same."

b.) Defendant, Arthur Levitt, wrote, relevant hereto, to several romanian claimants and affiant in connection with the release and payment of funds being withheld by his office, the following:

"Upon the basis of the documentation you have submitted we have conferred with our Legal Division and as a result we are of the opinion that you have established yourself as the owner of the funds involved. We regret to say however, that at the present time pursuant to a policy recommended by our Attorney General, we are not able to effect payments to residents of certain Eastern European Countries including Roumania because the situation exists which makes it doubtful as to whether the recipients of our checks would receive full value for the dollar amount thereof." (28 February, 1962, Appendix I.)

"We have given your letter careful consideration together with the documentation forwarded there-

with. We are advised that the Department of Law is aware of the removal of Romania from the list of countries contained in Treasury Circular 655. The Department of Law however has advised us that it will continue its position as to payments to distributees domiciled in Romania. A recent decision in the Surrogate's Court, New York County (Matter of Greenberg, New York Law Journal, June 16, 1964) upheld the position of the Attorney General of this State. Presumably this case will be appealed but until a reversal is had we must hold to the position taken in our letter to your client of February 28, 1962." (16 November, 1964, Appendix II.)

"* * *, we are not approving any claims payable to residents of Roumania who are within the jurisdiction of the Soviet Government." (June 6, 1962, Appendix IV.)

"* * *, our position in allowing refunds, on claims held by residents of Roumania has not changed and any action that you take at this time to obtain such a refund would be entirely at your own risk and also that of the claimants as we would not make any payments until such time as those who are entitled to said payments are without the jurisdiction of Roumania." (June 15, 1966, Appendix V.)

"We regret to inform you, however, that inasmuch as you represent a Rumanian National who claims to be entitled to the above estate, payment of the above captioned item may not in any event be made to him under existing policy and regulations until such time as it is believed such Rumanian Nationals will be enabled to have the full use or benefit of such funds as may be transmitted to them." (June 13, 1962, Appendix VI.)

"Please be advised that notwithstanding any present Federal regulations in reference to the transmission of money to private individuals residing in countries within the jurisdiction of the Soviet Union, the

policy of this Department is to withhold any such payments until and when the parties residing within such countries are outside of the jurisdiction of the Soviet Union." (July 6, 1962, Appendix VII.)

"We regret to advise, notwithstanding the numerous citations set forth in your letter, that this department will not honor any claims from Rumanian nationals as of the present time." (March 4, 1963, Appendix VIII.)

4. The most recent pronouncement of the New York courts with regard to the rights of nationals and residents of Romania to receive the proceeds from New York estates or other funds due them is the case of *In Re Greenberg*, 46 Misc. 883, 261 N.Y.S. 2d 176 (Surr. Ct. 1964), aff'd 24 App. Div. 2d 435 (1st Department, 1965) leave to appeal denied, 17 N.Y. 2d 417 (December 30, 1965); Defendant Joseph A. Cox, Surrogate of New York County, refused payment to the legatee in Romania in *Greenberg*, and, among the reasons for his action, stated in his opinion:

"The burden of establishing that the Rumanian national would have the benefit or use or control of the money or other property due him was upon the attorneys in fact (Surrogate's Ct. Act, ss. 269-a). The evidence offered to meet this burden consisted primarily of testimony of an officer of the Rumanian Legation in Washington who stated that by reason of his employment for four years as a lawyer he had become an expert in the estate law of Rumania. This witness testified that a Rumanian resident receives his inheritance in Rumanian currency at the rate of 12 lei for each dollar, which is twice the government controlled rate of exchange for commercial transactions. This witness also testified as to the free use of such money within Rumania although it could not be transmitted outside of that country. The testimony was that a Rumanian must notify the State Bank of any inheritance and must act through an attorney in fact in the collection of the money.

It must be recognized that, whether or not Rumania imposes restrictions within the meaning of section 269-a, it is an iron curtain country under Soviet dominance and, for such reason, facts either as to the operation of Rumanian laws or that country's monetary practices are not available to an inquirer who might be regarded as influenced by capitalist doctrines. It would appear that this was the unfortunate position in which the Attorney General found himself. The Attorney General was able to offer evidence of certain restrictive provisions of Rumanian law governing the ownership and use of property generally and these restrictions are well recognized as consistent with the Communist program of subordinating individual freedom for the material advancement of the Communist state. However, these restrictions do not seem to be peculiar to beneficiaries of foreign inheritances. While the attorneys in fact for the Rumanian national make much of the preferential exchange rate purportedly applicable to foreign inheritances, this argument is premised upon the assumption that an exchange rate of double that available in certain commercial transactions within Rumania is necessarily fair. This assumption can only be as sound as its premise, which is that the normal rate of exchange embodies a modicum of fairness. Casting grave doubt upon the usefulness of this formula is the established fact that Rumanian lei are procurable in this country at a rate of 31¾ lei to the dollar. Upon this basis the rate of exchange applicable to foreign legacies must be regarded as confiscatory and it cannot be validly contended that a Rumanian who would forfeit such a large portion of his legacy is receiving the benefit or use of $150,000."

5. The appellate court, in affirming the order of Surrogate Cox in *Greenberg*, declared:

"* * * The substantial differential between the Romanian internal rate of exchange applicable to estate distributions received from foreign countries and the

external rate of exchange establishes that the distributee 'would not have the benefit or use or control of the money or other property due him," as required by section 269-a of the Surrogate's Court Act. With respect to the other circumstances in Romania affecting the distributee's interest in view of the large sum of money involved ($120,797.69), and the distributee's failure to make a personal appearance to testify in support of his own claim, there is grave doubt additionally, that he will have the benefit, use or control of the money or property."

6. The defendant, Surrogate Samuel DiFalco, in the estate of Jerotheos Stavrou, in which plaintiff, George Fundi is a distributee, in settling said estate, ordered (NYLJ, 8/3/65), pertinent hereto, as follows:

"Any sum payable to legatees or distributees in Rumania will be deposited in court pursuant to section 269-a of the Surrogate's Court Act (Matter of Greenberg, NYLJ, June 16, 1964 (Cox, S.), aff'd App. Div. 1st Dept, NYLJ)."

7. The defendant, Surrogate Silver, in construing the will in the *Matter of the Estate of Mary Moroson* entered the following order (N. Y. L. J. 5/12/65):

"The shares of the distributees, who are Romanian Nationals, will be deposited with the director of finance of the City of New York pursuant to section 269-a of the surrogate's court act (Matter of Greenberg, NYLJ June 16, 1964, p. 14, cols. 3-4 (Cox, S)). Settle decree."

8. The Surrogate, in the judicial settlement in the *Estate of Maurice Siegel,* wherein the rights of plaintiff, Anghel Goldstein are involved, decreed:

"Ordered, Adjudged and Decreed that the distributive share to which the said Angel Goldstein is entitled be paid into this Court by depositing the sum of $2,230.40 with the Treasurer of the City of New York to the credit of this proceeding, and the Treasurer

of the City of New York hereby is directed to deposit said sum of $2,230.40 in any savings bank located in the County of Bronx for the benefit of said Angel Goldstein and subject to the further order of this court, and it is further"

10. According to the decision of the Supreme Court of the United States in *Zschernig,* the history and operation of the New York statute, as hereinabove shown, "make clear that (Section 269-a) is an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress." Mr. Justice Douglas, in the majority opinion of the Court in the *Zschernig* case stated, "as one reads the Oregon decisions, it seems clear that foreign policy attitudes, the freezing or thawing of the 'cold war,' and the like are the real desiderata." And, as a footnote to this statement, the opinion of the Court recites: "Such attitudes are not confined to the Oregon courts. Representative samples from other States would include statements in the New York courts, * * *." In commenting upon such statements and attitudes of the state courts in their application of the "Iron-Curtain" statute, Mr. Justice Douglas further declared: "* * * Yet they, of course are matters for the Federal Government, not for local probate courts."

11. Mr. Justice Stewart, in a concurring opinion joined by Mr. Justice Brennan, in *Zschernig,* reviewed the provisions of the Oregon "iron-curtain" statute, one of which is similar substantially with the statute hereunder attack ("benefit, use and control"), and commented, as follows: "I believe that all three of the statutory requirements on their face are contrary to the Constitution of the United States. In my view, *each* of the three provisions of the Oregon law suffers from the same fatal infirmity. *All three launch the State upon a prohibited voyage into a domain of exclusively federal competence.* Any realistic attempt to apply any of the three criteria would necessarily involve the Oregon courts in an evaluation, either expressed or implied, of the administration of foreign law, the credibility of foreign diplomatic statements, and the

policies of foreign governments. Of course state courts must routinely construe foreign law in the resolution of controversies properly before them, *but here the courts of Oregon are thrust into these inquiries only because the Oregon legislature has framed its inheritance laws to the prejudice of nations whose policies it disapproves and thus has trespassed upon an area where the Constitution contemplates that only the National Government shall operate.*" (Emphasis supplied.) A substitution of New York in the place of Oregon in the foregoing declaration readily reveals that New York statute "suffers from the same fatal infirmity."

WHEREFORE, Deponent submits that the Surrogate's Court Act, Section 269-a, is invalid and unconstitutional, and respectfully requests that the relief prayed for in the complaint herein be granted.

JOHN R. VINTILLA.

(Jurat omitted in printing.)

AFFIDAVIT IN OPPOSITION TO ASSUMPTION OF JURISDICTION BY A SINGLE DISTRICT COURT JUDGE IN THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK.

(Title omitted in printing.)

STATE OF NEW YORK,
COUNTY OF NEW YORK, SS.:

DANIEL M. COHEN, being duly sworn, deposes and says:

1. He is an Assistant Attorney General of the State of New York, who is familiar with this case and makes this affidavit in opposition to the plaintiffs' motion for summary judgment which was returnable April 23, 1968 before a single judge sitting in the motion part of this Court.

2. At the outset, this Court's attention must be drawn to the fact that on March 8, 1968, the United States Court of Appeals for the Second Circuit (Moore, Smith and Kaufman, Circuit Judges), handed down the following decision (Docket No. 31396), which, after reciting the statute whose constitutionality is here involved and the prior history of this case, remanded it to a three-judge court:

"PER CURIAM:

Appellants, nationals and residents of Rumania, brought this action seeking an injunction restraining five New York surrogates from enforcing section 269-a of the New York Surrogate's Court Act on the ground that it is unconstitutional as applied to them. Section 269-a provides:

1. Where it shall appear that a legatee, distributee or beneficiary of a trust would not have the benefit or use or control of the money or other property due him, or where other special circumstances make it appear desirable that such payments should be withheld, the decree may direct that such money or other property be paid into the surrogate's court for the benefit of such legatee, distributee, beneficiary of a trust or such person or persons who may thereafter appear to be entitled thereto. Such money or other property so paid into court shall be paid out only by the special order of the surrogate or pursuant to the judgment of a court of competent jurisdiction.

2. In any such proceeding, where it is uncertain that an alien legatee, distributee or beneficiary of a trust, not residing within the United States or its territories, would have the benefit or use or control of the money or other property due him, the burden of proving that such alien legatee, distributee or beneficiary of a trust will receive the benefit or use or control of the money or other property due him shall be upon him or on the person or persons claiming from, through or under him.

The appellants' motion for the convening of a three-judge court under 28 U.S.C. § 2281, and for a preliminary injunction, was denied and they appealed to this court.

On September 27, 1967, this court affirmed in open court the order of the court below. Our decision was vacated by the Supreme Court, ____ U.S. ____ [36 L. W. 3285 (1/15/68)], and remanded for further consideration in light of *Zschernig v. Miller,* ____ U.S. ____ [36 L. W. 4120 (1/15/68)], in which the Court interpreted *Clark v. Allen,* 331 U.S. 503 (1947), as being 'concerned with the words of a [state] statute on its face, not the manner of its application,' and held that the 'history and operation' of a similar Oregon statute constituted 'an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress,' at 4121.

Upon reconsideration, we reverse the order of the district court and remand for consideration of the constitutional issues by a three-judge court pursuant to 28 U.S.C. § 2281."

3. The present status of the case, therefore, by reason of the Court of Appeals order of March 8, 1968, is that it has been remanded "for consideration of the constitutional issues *by a three-judge court* pursuant to 28 U.S.C. § 2281" (Emphasis supplied). Consideration of the present motion by a *single judge* would, under the circumstances detailed above, be beyond the power of a single judge and would be *improper*. As of the date of this affidavit, deponent has not been informed of the designation of a three-judge court.

4. When a three-judge Court has been designated and has been convened, that Court may deem it *essential* to the proper disposition of the constitutional issues presented to hold a hearing with relation to those issues. The pleadings and allegations contained in affidavits now on file in this Court, including those filed with reference to the instant motion, may not provide an adequate basis for decision of

the constitutional issues here involved. Further pleadings, applications and even the taking of testimony and the presentation of other proof may be deemed necessary.

5. Plaintiffs have named only the Judges of the Surrogate's Court of certain of the New York City counties as defendants in this case. Not even all the judges of the Surrogate's Courts elected or designated to sit within New York City's five counties have been made parties to this suit. None of the judges of the Surrogate's Courts of the State's other 57 counties has been brought in.

6. The very form of this action, against selected judges of the Surrogate's Court, should lead this Court to question whether the plaintiffs should not be restricted to a state-court forum which is available to them for direct review, by appeal, upon the same constitutional grounds urged here by them from any state-court decisions that may have been handed down by those judges withholding payment from them of legacies, beneficial interest or distributive shares.

7. Actually, the reason for plaintiffs' resort to this Court, and more particularly, for their current effort to avoid a hearing even before *the three-judge Court which they themselves have invoked* is that the evidence will show that our New York statute is not only constitutional on its face, but has been and is being applied in a constitutional manner. New York's statute differs, in both its terms and effect, from the Oregon statute considered in the *Zschernig* case mentioned (*supra*) in the Court of Appeals opinion. In effect, what the plaintiffs seek to avoid both by this action and this motion is a case-by-case scrutiny of their claims by state court judges who have been conscientiously and carefully inquiring into the possibility, in each case brought before them, of whether nonresident legatees, devisees, beneficiaries or even distributees may be able actually to receive the beneficial enjoyment of the shares of New York's decedent's estates which New York decedents intended or are deemed to have intended them to enjoy.

WHEREFORE, deponent respectfully requests that the plaintiffs' motion for summary judgment addressed to a single District Court Judge at Motion term be denied; or that, in lieu of the relief sought by the plaintiffs, this matter be transferred for consideration of the constitutional issues involved herein by a three-judge court as directed by the Court of Appeals for this Circuit on March 8, 1968.

DANIEL M. COHEN.

(Jurat omitted in printing.)

SUPPLEMENTAL AFFIDAVIT OF ATTORNEY GENERAL IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

(Filed June 19, 1968, title omitted in printing.)

STATE OF NEW YORK,
COUNTY OF NEW YORK, SS.

DANIEL M. COHEN, being duly sworn, deposes and says:

1. This affidavit is submitted to supplement a prior affidavit by Daniel M. Cohen, sworn to April 24, 1968, submitted by the Attorney General in opposition to a motion made by the plaintiffs for summary judgment returnable before a single District Court Judge. The Attorney General's affidavit, in "opposition to the assumption of jurisdiction by a single District Court Judge" set forth certain facts pertinent to the disposition of such a motion, even by a three-judge Court.

2. This supplemental affidavit is submitted to the Court, pursuant to the order of District Court Judge Edward C. McLean, dated June 13, 1968, received June 17, 1968, by the Attorney General, notifying the parties that "plaintiffs' motion for summary judgment will be heard

before the Court of three judges duly designated herein on June 25, 1968" and requiring all papers to be filed by June 20, 1968. The purpose of this supplemental affidavit is to furnish additional proof that there are *issues of fact* with reference to the "application" of the terms of the New York statute here involved (Surrogate's Court Act, § 269-a, now Surrogate's Court Procedure Act, § 2218), which, in any event, prevent the granting of the relief sought by the plaintiffs herein—a declaration of the unconstitutionality of the New York statute and an injunction against its application by the Surrogates named as defendants in this law suit.

3. Reference has already been made in deponent's affidavit of April 24, 1968 to the fact that only certain judges of the Surrogate's Court of specific counties in the City of New York have been made defendants in this case (Par. 5). It must be evident that any misapplication of this statute by these judges is reviewable not only by the Appellate Divisions of the First and Second Judicial Departments but also by the Court of Appeals of the State of New York. It has already been suggested that the plaintiff should be restricted, in the review of the decision of these judges, to state court forums which afford them direct review by appeal (Par. 6). Those forums have indicated no hesitancy in passing upon constitutional questions of the same nature as those urged as a basis for the maintenance of this action. (See, *Matter of Laikind* [decided June 14, 1968 by the Court of Appeals of the State of New York], 22 N.Y. 2d.)

A copy of the Court of Appeals decision in the *Laikind* case is annexed hereto (Exhibit "A").

4. We have also already suggested to this Court that the purpose of this motion is to avoid a hearing at which evidence can be shown that our New York statute, which is constitutional on its face, has been and is being applied in a constitutional manner; and the purpose of this action is to avoid a case-by-case scrutiny of the claims of nonresidents by state court judges who have been conscien-

tiously and carefully inquiring into the possibility, in each case brought before them of whether such non-resident legatees, devisees, beneficiaries or distributees may actually be able to receive the beneficial enjoyment of the shares of New York's decedents' estates which those decedents intended or have deemed to intend such non-resident persons to enjoy (April 24, 1968 affidavit; Par. 7).

5. This motion for summary judgment is predicated upon the erroneous assumption that its disposition is controlled by the decision of the United States Supreme Court in *Zschernig v. Miller,* 389 U.S. 429. Upon the same erroneous assumption a motion for rehearing was made in *Matter of Ioannou,* 371 U.S. 30, to obtain a rehearing of the appeal in that case. The petition for rehearing in *Ioannou* was denied upon representations made by the State Attorney General that further procedure was available in the New York State courts by way of a new application for withdrawal for the funds involved in *Ioannou* upon the basis of allegations of changed circumstances (of which the decision in *Zschernig* was but a single circumstance). On that basis, a new application for withdrawal has been made by the petitioner Ioannou; but the complexity of the situation facing the state courts in these matters is evidenced by the fact that in the *Ioannou* case, a conflicting claim to the same fund has also been filed *by an alleged attorney-in-fact of Viktoria Miculka, the distributee who had allegedly also executed an assignment of her distributive share at the American Embassy in Prague to Ioannou, her niece, who lived in London.* Since we do not deem it essential at this stage of the proceeding, in connection with this motion, we shall not encumber these papers with the details of complexities arising or that have arisen in connection with similar cases involving the claims of non-residents. The *Ioannou* decision and the details of that case have been referred to merely to demonstrate that the Supreme Court itself did not feel compelled to reverse or overrule its prior decision, made in 1962 in relation to the New York statute because

of its decision in 1968 with relation to the Oregon statute involved in the *Zschernig* case. The Supreme Court, of course, cited its decision in *Zschernig,* but used the restrictive word "see" in its reference to that decision, as well as in its reference to its decision remanding this case to the Court of Appeals on the question of convening a three-judge Court (Exhibit "B," decided June 3, 1968).

6. We have already referred to the very recent decision of the New York Court of Appeals in *Matter of Laikind,* 22 N.Y. 2d , decided June 14, 1968. The very same question which is presented to this Court was presented to the New York Court of Appeals—"whether the impounding of the funds here violated the federal constitution under the ruling of the *Zschernig* case" (Exhibit "A," p. 3). Writing for a majority of the Court, Judge Breitel recognized that in *Zschernig* the Supreme Court had considered the constitutionality of an Oregon statute "similar in some respects to the New York statute." He noted, however, that "Despite some similarities, the Oregon and New York statutes are different" (Exhibit "A," p. 4). He observed that the New York statute, unlike the one in Oregon, contained no provision for reciprocity or escheat, a matter which might be of little help in resolving the issues of that case. He further observed, however, that (Exhibit "A," p. 4):

> "the absence of an escheat provision in the New York statute, even though the Oregon escheat provision was not discussed or made a ground of decision by the Supreme Court, may be of the critical importance in sustaining the validity of New York's statute, at least on its face."

In *Laikind,* Judge Breitel also noted (Exhibit "A," p. 4):

> "Moreover, the majority opinion in the *Zschernig* case, in accepting the constitutionality of 'reciprocity,' arguably accepted 'benefit, use or control' provisions as valid, provided state courts did no more than 'routinely read' foreign laws and provided there was

no palpable interference with foreign relations in their application."

In a footnote, Judge Breitel observed the fact that in *Zschernig,* Justices Stewart and Brennan had, in a concurring opinion, found the Oregon statute unconstitutional on its face. Judge Breitel relegated to a later case the possibility that the Supreme Court might hold "that in reality no such statute could ever be restricted to a 'routine reading' " (Exhibit "A").

On this subject Judge Breitel, in the *Laikind* case, concluded by holding the following:

"if the courts of this State, in applying the 'benefit or use or control' requirements, simply determine, without animadversions, whether or not a foreign country, by statute or otherwise, prevents its residents from actually sharing in the estates of New York decedents, the statute would not be unconstitutional under the explicit rationale of the *Zschernig* case."

He further observed (Exhibit "A," p. 5):

"Indeed, petitioner has made no showing that the lower courts in this case have currently engaged in the conduct criticized, and additionally illustrated in the footnotes of the *Zschernig* case, as interference with foreign relations. Consequently, there is no present warrant to reconsider the earlier rulings of this Court sustaining the constitutionality of the statutes which preceded the present one (*Matter of Marek,* 11 N.Y. 2d 740, app. dism. *sub nom. Ioannou v. New York,* 371 U. S. 30 [for want of a substantial federal question]. *Matter of Braier,* 305 N.Y. 148, 156 app. dism. *sub nom. Kalmane v. Greene,* 346 U. S. 892)."

In connection with another aspect of the *Laikind* case, the Court of Appeals held (Exhibit "A," p. 5):

"the applicable New York statute does not necessarily require that the funds be restricted until it is deter-

mined that the beneficiary himself will have 'benefit or use or control' of them. The funds are also impounded 'for the benefit * * * such person or persons who may thereafter appear to be entitled thereto.' "

7. The movants' complete reliance upon the remand of this case "for further consideration in light of *Zschernig v. Miller,* is further evidenced by the letter of June 19, 1968, addressed to Judge McLean of this Court by movants' counsel, John R. Vintilla, in which he refers to that decision as a "clear mandate." Movants fail to recognize that the mandate did not direct a peremptory disposition of this case, but was a remand for *"further consideration."*

8. "Further consideration" of this case by the Court, requires more than a bare-bones comparison of the words of our New York statute with those of the Oregon statute involved in *Zschernig.* Particularly is this so since we have two decisions of the highest court of our State construing the terms of the New York statute, handed down as recently as June 14, 1968. Reference is made not only to the decision in *Matter of Laikind* (*supra*), but also to the decision in *Matter of Krasowski* (*supra*) in which the Court of Appeals (citing *Laikind*), denied the Attorney General's application for leave to appeal from a Third Department order directing transmission of an alien beneficiary's share to Poland.

9. Clearly, therefore, movants may not succeed on a comparison merely of the terms of the New York and Oregon statutes. Nor can they, when the United States Supreme Court itself predicated its decision not only on the terms of the Oregon statute, but on *Oregon's method of applying that statute,* render that statute or the Supreme Court's findings as to Oregon's method of application controlling as to the factual situation relating to the method of application of the New York statute.

10. As to the proper construction of the New York statute, this federal court should deem itself not only to

be persuaded, but guided by the construction given to the statute by the highest of our State Courts. See *Mayer v. Chase National Bank,* 233 F. 2d 468, 470 (2d Cir., 1956), where the Court of Appeals followed the Supreme Court direction made in *Erie R. Co. v. Tompkins,* 304 U. S. 64, to give respectful heed to the pronouncements even of "inferior state tribunals of record." In the *Mayer* case, this Circuit did not, as here, enjoy the advantage of any pronouncement by the New York Court of Appeals as to the proper construction to be given to the new York statute there cited for construction.

11. Indeed, it is clear that in *Laikind,* the Court of Appeals "considered" the statute here under attack in light of *Zschernig v. Miller.* It specifically found that no showing had been made in *Laikind* (Exh. "A," p. 5) that the lower courts in that case had "currently engaged in the conduct criticized, and additionally illustrated in the footnotes in the *Zschernig* case, as interference with foreign relations." It concluded, therefore, in *Laikind* that there was "no present warrant to reconsider the earlier rulings" of the New York Court of Appeals "sustaining the constitutionality of the statutes which preceded the present one (S.C.P.A., § 2218, formerly Surr. Ct. Act. § 269-a).

12. The original emphasis of the complaint in this action was placed upon the "possible conflict between the New York Statute and the new federal policy vis-a-vis Rumania as expressed in the 1960 agreement and subsequent federal regulations" (McLean, D.J., opinion of April 4, 1967). But for the decision in *Swift & Co. v. Wickham,* 382 U. S. 111, indicating that a three-judge Court should not be convened in a "supremacy" situation, Judge McLean might have convened a three-judge Court herein in 1967. The alleged conflict presented a question which he did not deem to have been "set at rest by the decisions cited above" [*Braier,* 305 N. Y. 148, app. dism. 346 U. S. 802 *sub nom. Kalmane v. Green; Marek,* 11 N. Y. 2d 740, app. dism. 371 U. S. 30 *sub nom. Ioannou*

v. New York; and *In re Greenberg,* 46 Misc. 2d 883, aff'd 24 A. D. 2d 435 1st Dept. (1965), leave den. 16 N. Y. 2d 417 (1965)]. But this question has, in effect, been settled by the Appellate Division in the Second Department in *Matter of Kina,* 29 A. D. 2d 563 (Dec., 1967), where the application for payment of funds was made by Polish distributees at a time after Poland had been removed by the United States Treasury Department from the list of countries to which federal checks and warrants might not be transmitted. Since the decision in *Kina* is officially reported, we need not reproduce it here.* Accordingly, even the basis depended upon by Judge McLean, in 1967, for deeming a substantial federal question to have been presented by the alleged conflict, the absence of a state court decision—no longer appears to be valid. This federal law suit should, therefore, be dismissed, for lack of substantiality.

13. Not to exhaust the subject, but merely to set forth examples, it may also be noted that even where the federal Treasury Regulation had *not* delisted a specific country, the New York courts had been directing transmission of payments to foreign residents to whom transmissions were found to be feasible. E.g., as to Czechoslovakia, see *Matter of Reidl,* 23 A.D. 2d 171 (1st Dept., 1965); *Matter of Karman,* 51 Misc. 2d 707 (Surr. Ct., Erie Co., 1966); *Matter of Matous,* 53 Misc. 2d 255 (Surr. Ct., West. Co., 1967); and see *Estates of Lehman, Szekac* and connected cases, 155 N.Y.L.J., No. 124, June 27, 1966, p. 13, Surr. Ct., N.Y. Co., *DiFalco,* Surr.). So that the New York courts, in their discretion, direct transmissions

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* An appeal taken to the New York Court of Appeals from the Appellate Division decision in *Kina* is subject to dismissal for lack of prosecution. Indeed, on June 14, 1967, the New York Court of Appeals ruled, in *Kina* (159 N.Y.L.J., No. 118, Tuesday, June 18, 1968, page 2):

"Motion, considered as a motion to preclude the appellants from serving and filing briefs on the appeal herein, granted unless the briefs are served and filed no later than August 1, 1968."

both in situations where a country has been delisted and also where a country still remains on the Treasury list. See the New York Times of June 17, 1968 (late City Ed. pp. one and eleven) indicating the consideration now being given by federal authorities to the subject of delisting of Czechoslovakia.

14. That the *Zschernig* case is not entitled to receive the broad, sweeping, construction contended for by the movants is evidenced even by the brief of the successful appellants in that case. It stated (p. 55):

> "It is also not deemed necessary to discuss the so-called "eastern" statutes—and the court decisions thereunder—which are not in fact confiscatory or punitive in their terms or effect but give the probate judges authority and discretion to withhold and defer actual delivery or payment of inheritances to foreign heirs until the court is satisfied that the foreign heir will in fact receive the full 'benefit, use or control' of the money or other property."

The appellants in *Zschernig* conceded to the Supreme Court that New York Surrogate's Court Act § 269-a was typical of such statutes (U.S. Sup. Ct. Brief, p. 55).

15. The decision in *Laikind* demonstrates that our highest state court, upon a proper record, is prepared to deal with the question of whether the New York Statute is being constitutionally applied. No reason has been shown by the movants to doubt the fact that, upon an appropriate record the New York Court of Appeals will endeavor to lend guidance to the lower courts of the State so that they will be able to ascertain what constitutes a "routine reading" of the laws of a foreign country and what procedures might amount to "palpable interference with foreign relations" in the application of our New York Statute. In *Laikind*, some guidance has been given already to the extent that the Court has stated (Exh. "A," p. 4):

> "if the courts of this State, in applying the 'benefit or use or control' requirements simply determine, with-

out animadversions, whether or not a foreign country, by statute or otherwise, prevents its residents from actually sharing in the estates of New York decedents, the statute would not be unconstitutional under the explicit rationale of the *Zschernig* case."

16. Finally, for the purposes of this motion, we must recall to this Court that the power of the States to regulate the succession and distribution of the estates of persons located within the individual States has long been recognized by our federal government. *United States v. Fox*, 94 U.S. 315 (1877). Indeed, in *Irving Trust Co. v. Day*, 314 U.S. 556, 562 (1942), it was held that nothing in the federal Constitution prohibits our Legislature from limiting, conditioning or even abolishing the power of testamentary disposition of property within our jurisdiction. New York's power over the distribution of its decedents' estates has not been limited by any treaty referred to in the complaint. And the federal regulation—both listing and delisting referred to in the complaint and the moving papers—refer merely to the subject of the transmission of *federal funds*, not *private funds*. We are informed that the State Department does not regard the administration of estates to be a federal function and that it declines to make a judgment as to whether, particularly in certain Soviet states, Soviet heirs do receive benefit or use or actual enjoyment of estate shares. The State Department, we are informed, too, would expect the State Courts to determine, in the first instance, whether our New York Statute, in the light of the *Zschernig* decision, constitutes an unconstitutional intrusion into the field of foreign affairs.

WHEREFORE, *the motion for summary judgment should be denied and the complaint herein should be dismissed.*

DANIEL M. COHEN,
Assistant Attorney General.

(Jurat omitted in printing.)

EXHIBIT A.

STATE OF NEW YORK
COURT OF APPEALS

2. No. 152 68

In the Matter of
the Petition of Harry Laikind, to render and settle his Account as Administrator of Sam Leikind, Deceased,
Appellant-Respondent,

vs.

Attorney General of the State of New York,
Respondent-Appellant,

Davareh Kaminsky, & ors., &c.,
Defendants.

OPINION.
(22 N. Y. 2d 346.)

No. 66 Civil 4487

IN THE UNITED STATES DISTRICT COURT.

SOUTHERN DISTRICT OF NEW YORK.

ANGHEL GOLDSTEIN, aka Andrei Pietraru,
IULIU NASTA, aka Julius Nasta and
GHEORGHE FUNDI,
On behalf of themselves and all others similarly situated,
Plaintiffs,

vs.

JOSEPH A. COX and SAMUEL DiFALCO,
Surrogates of the County of New York,
EDWARD F. SILVER,
Surrogate of the County of Kings,
CHRISTOPHER C. McGRATH,
Surrogate of the County of Bronx,
JOHN T. CLANCY,
Surrogate of the County of Queens,
ARTHUR LEVITT,
Comptroller of the State of New York,
Defendants.

OPINION OF THE DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK.

(Filed December 20, 1968.)

McLEAN, *District Judge.*

The three plaintiffs in this action are nationals and residents of Rumania. They sue "on behalf of themselves and all other residents of Romania, similarly situated" for a judgment declaring that Section 2218 of the New York Surrogate's Court Procedure Act, formerly Section

269-a of the Surrogate's Court Act, is unconstitutional.* They also seek an injunction restraining five New York Surrogates and the Comptroller of the State of New York from enforcing and applying it.

The prior history of this action may be briefly stated.

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* This statute now reads as follows:

"1. (a) Where it shall appear that an alien legatee, distributee or beneficiary is domiciled or resident within a country to which checks or warrants drawn against funds of the United States may not be transmitted by reason of any executive order, regulation or similar determination of the United States government or any department or agency thereof, the court shall direct that the money or property to which such alien would otherwise be entitled shall be paid into court for the benefit of said alien or the person or persons who thereafter may appear to be entitled thereto. The money or property so paid into court shall be paid out only upon order of the surrogate or pursuant to the order or judgment of a court of competent jurisdiction.

(b) Any assignment of a fund which is required to be deposited pursuant to the provisions of paragraph one (a) of this section shall not be effective to confer upon the assignee any greater right to the delivery of the fund than the assignor would otherwise enjoy.

2. Where it shall appear that a beneficiary would not have the benefit or use or control of the money or other property due him or where other special circumstances make it desirable that such payment should be withheld the decree may direct that such money or property be paid into court for the benefit of the beneficiary or the person or persons who may thereafter appear entitled thereto. The money or property so paid into court shall be paid out only upon order of the court or pursuant to the order or judgment of a court of competent jurisdiction.

3. In any such proceeding where it is uncertain that an alien beneficiary or fiduciary not residing within the United States, the District of Columbia, the Commonwealth of Puerto Rico or a territory or possession of the United States would have the benefit or use or control of the money or property due him the burden of proving that the alien beneficiary will receive the benefit or use or control of the money or property due him shall be upon him or the person claiming from, through or under him."

Section 1 was added by Ch. 998 of the Laws of 1968 which became effective on June 22, 1968, after the motion now under consideration was made.

In the spring of 1967 plaintiffs moved for an order convening a three-judge court pursuant to 28 U.S.C. § 2281. They also moved for an injunction pendente lite. The district court denied the preliminary injunction. It also denied the request for a three-judge court on the ground that, although a substantial federal question was raised, this question was one of federal "supremacy" which, under *Swift & Co. v. Wickham,* 382 U. S. 111 (1965), was to be decided by one judge, not by three.

Goldstein v. Cox, 66 Civ. 4487 (S.D.N.Y. April 4, 1967).

On September 27, 1967, the Court of Appeals, from the bench, affirmed the order of the district court. The Supreme Court, however, vacated the order of the Court of Appeals and remanded the case to the Court of Appeals "for further consideration in light of *Zschernig v. Miller.*" (389 U.S. 429 (1968).)

Goldstein v. Cox, 389 U.S. 581 (1968).

The Court of Appeals thereupon reversed the order of the district court and remanded the case for consideration of the constitutional issues by a three-judge court.

Goldstein v. Cox, 391 F.2d 586 (2d Cir. 1968).

Plaintiffs then moved for summary judgment. That is the motion which we are now called upon to decide.

The motion is supported only by an affidavit of plaintiff's attorney which is devoted primarily to a discussion of the law. It contains few facts. As to plaintiff Goldstein, it says only:

> "The Surrogate, in the judicial settlement in the Estate of Maurice Siegel, wherein the rights of plaintiff, Anghel Goldstein are involved, decreed:
>
> 'Ordered, Adjudged and Decreed that the distributive share to which the said Angel Goldstein is entitled be paid into this Court by depositing the sum of $2,230.40 with the Treasurer of the City of New York to the credit of this proceeding, and the Treasurer of the City of New York hereby is di-

rected to deposit said sum of $2,230.40 in any savings bank located in the County of Bronx for the benefit of said Angel Goldstein and subject to the further order of this court, and it is further.' "

The affidavit contains a similar statement as to plaintiff Fundi, reading as follows:

"The defendant, Surrogate Samuel DiFalco, in the estate of Jerotheos Stavrou, in which plaintiff, George Fundi is a distributee, in settling said estate, ordered (NYLJ, 8/3/65), pertinent hereto, as follows:

'Any sum payable to legatees or distributees in Rumania will be deposited in court pursuant to section 269-a of the Surrogate's Court Act (Matter of Greenberg, NYLJ, June 16, 1964 (Cox, S.), aff'd App. Div. 1st Dept. NYLJ.' "

The text of the affidavit does not refer to plaintiff Nasta. Annexed to the affidavit, however, are copies of letters from the office of the New York Comptroller dated respectively February 28, 1962 and November 16, 1964, the first of which is addressed to Juliu Nasta in Bucharest, Rumania, and the second to plaintiffs' attorney. Each letter is captioned:

"NASTA, JULIU
Atty-in-Fact for
Opreana Comanicu
J. P. Morgan & Co.
Acct. BD#47801
Abandoned Property"

There is no explanation of what the "abandoned property" is, how it came to be abandoned, or whether it has any connection with the statute here under consideration. In each letter the Comptroller's Office stated in substance that pursuant to a policy recommended by the New York Attorney General, the Comptroller was not in a position to make payment of residents of Rumania.

The only other factual material submitted in support of this motion consists of a copy of a letter dated

October 15, 1965 from the then Surrogate of Kings County to Isac Silianu (not a plaintiff) in Bucharest, Rumania, and copies of five letters from the office of the New York Comptroller bearing various dates in 1962, 1963 and 1966, one of which is addressed to Borbala Barbieri (not a plaintiff) in Bucharest, Rumania, and the others to the same attorney who represents the plaintiffs in this action.

The Surrogate's letter stated in substance that if Isac Silianu were to make formal application for the payment of his bequest in full, the Surrogate would be constrained to deny it, but that the Surrogate would give "sympathetic consideration to a request for transmittal to you in periodic installments of small sums for purchase of food and clothing parcels, if a demonstration can be made of the feasibility thereof."

The Comptroller's letters were each headed "Abandoned Property." Two of them indicate that the property consists of an account in J. P. Morgan & Co. The other three refer to "Prunder, Denette, Estate of." In each letter the Comptroller's office in substance declined to pay a claim of a resident of Rumania or of individuals within the jurisdiction of the Soviet Union.

The motion is opposed by an affidavit of an Assistant Attorney General of New York. That affidavit is entirely argumentative. It can fairly be said to contain no facts at all.

On this record we are asked to hold as a matter of law that Section 2218 is unconstitutional because it interferes with the exclusive prerogative of the Federal government to conduct the foreign affairs of the United States. Plaintiffs claim that this result is required by the Supreme Court's decision in *Zschernig*.

The validity of the statute, as it read at the time, was twice upheld by the New York Court of appeals prior to *Zschernig*.

> *Matter of Braier*, 305 N.Y. 148 (1953), *appeal dismissed sub nom. Kalmane v. Green*, 346 U.S. 802 (1953);

Matter of Marek, 11 N.Y.2d 740 (1962), *appeal dismissed sub nom. Ioannou v. New York*, 371 U.S. 30 (1962).

In each case the Supreme Court dismissed the appeal from the New York Court of Appeals' decision for want of a substantial federal question. As far as appears from the Court of Appeals' opinion in *Braier* and from the memorandum in *Marek* (in which no opinion was written), the ground upon which the constitutionality of the statute is challenged in the present action was not raised or decided in either case.

Recently the unsuccessful claimant in *Marek* (Ioannou) moved in the Supreme Court for leave to file a petition for rehearing. The Supreme Court denied the motion "upon the representation of the Attorney General of New York that the movant may file a new application 'to withdraw the funds deposited with the New York City Treasurer' in the light of changed circumstances. See *Zschernig v. Miller*, 389 U.S. 429; *Goldstein v. Cox*, 389 U.S. 581."

Ioannou v. New York, 391 U.S. 604 (1968).

In *Zschernig*, the Supreme Court had before it an Oregon statute which provided in substance that property of an Oregon decedent which would otherwise pass by succession or testamentary disposition to a nonresident alien would, in the absence of other eligible heirs, devisees or legatees, escheat to the state of Oregon unless the alien proved (1) the existence of a reciprocal right of a United States citizen to take property on the same terms as a citizen or inhabitant of the foreign country; (2) the right of United States citizens to receive payment here of funds from estates in the foreign country; and (3) the right of the alien to receive the benefit, use or control of the proceeds of Oregon estates, "without confiscation" by the government of his country. The Court held this statute unconstitutional because it impaired "the effective exercise of the Nation's foreign policy." 389 U.S. at 440.

Subsequent to this decision, the New York Court of Appeals again considered the constitutionality of Section 2218 and, despite *Zschernig,* declined to hold the statute unconstitutional on the record before it.

Matter of Leikind, 22 N.Y.2d 346 (1968).

We are called upon to decide whether, on the record now before us, we are impelled to a conclusion similar to, or different from, the conclusion which the New York Court of Appeals reached in *Leikind.*

The decision depends upon the reasons given by the Supreme Court in *Zschernig* for invalidating the Oregon statute. Before considering those reasons, however, mention must be made of an earlier Supreme Court decision, *Clark v. Allen,* 331 U.S. 503 (1947).

In *Clark,* the Court passed upon a California statute which contained reciprocal provisions substantially identical with the first two requirements in the Oregon statute, but which did not contain the benefit, use and control requirement. The Court upheld the constitutionality of the California statute as against a claim that it constituted an interference by the state of California in the field of foreign affairs.

In *Zschernig,* the Supreme Court expressly declined to overrule *Clark v. Allen.* Instead, it distinguished it, saying:

> "We were there concerned with the words of a statute on its face, not the manner of its application." 389 U.S. at 433.

The Court went on to point out that state courts frequently construe and apply the laws of foreign nations and that:

> "It has never been seriously suggested that state courts are precluded from performing that function, albeit there is a remote possibility that any holding may disturb a foreign nation * * *." 389 U.S. at 433.

But the Court said:

> "It now appears that in this reciprocity area under inheritance statutes, the probate courts of various States have launched inquiries into the type of governments that obtain in a particular foreign nation * * *." 389 U.S. at 433-34.

The Court pointed out that the Oregon statute added to the requirement of reciprocity a new concept of confiscation and that this had "led into minute inquiries concerning the actual administration of foreign law * * *." 389 U.S. at 435. The Court documented this statement by quoting intemperate remarks contained in opinions of state court judges, such as, "Russia kicks the United States in the teeth all the time," and the like. 389 U.S. n. 8 at 437. The Court said that the Oregon statute "as construed seems to make unavoidable judicial criticism of nations established on a more authoritarian basis than our own." 389 U.S. at 440.

The Court concluded that:

> "It seems inescapable that the type of probate law that Oregon enforces affects international relations in a persistent and subtle way." 389 U.S. at 440.

On this basis the Court held the Oregon statute unconstitutional.

Two justices concurring in a separate opinion stated that, while joining the opinion of the Court, they would go further and hold the Oregon statute unconstitutional on its face. Obviously, it was manifest to these two justices, as it is to us, that the opinion of the Court did not go this far, but held only that the Oregon statute was unconstitutional because of the manner of its application.

In *Leikind,* the New York Court of Appeals read the opinion of the Court in *Zschernig* as a decision dealing with the application of the statute by the Oregon courts. The Court of Appeals held that in the case before it there was no showing that "the lower courts in this case have currently engaged in the conduct criticized, and addi-

tionally illustrated in the footnotes of the *Zschernig* case, as interference with foreign relations." Consequently, said the court, "there is no present warrant to reconsider the earlier rulings of this court sustaining the constitutionality of the statutes which preceded the present one [*i.e., Braier* and *Marek, supra*]." 22 N.Y. 2d at 352.

The Court of Appeals recognized the possibility that the Supreme Court might extend the *Zschernig* rule in the future. Thus, it said that in *Zschernig*, the Supreme Court "arguably accepted 'benefit, use or control' provisions as valid, provided State courts did no more than 'routinely read' foreign laws and provided there was no palpable interference with foreign relations in their application." 22 N.Y.2d at 351-52. But the court conceded that "the sweep of the opinion might suggest to some that in a later case the court might hold that in reality no such statute could ever be restricted to a 'routine reading.' " 22 N.Y.2d n. 2 at 352.

In the case before us there is no showing that the New York courts have engaged in the conduct criticized in *Zschernig*. There is no showing and not even any claim that the New York courts have uttered any animadversions concerning Rumania. All we are told is that two New York Surrogates have directed that the distributive shares of plaintiffs Goldstein and Fundi in New York estates be deposited in court, pursuant to the statute, and that the office of the New York Comptroller has declined to turn over certain "abandoned properties" to persons resident in Rumania or in territories within the jurisdiction of the Soviet Union. We are not informed as to what investigation, if any, preceded these judicial and administrative decisions.

We conclude that this record is inadequate to justify this court in holding, summarily, that Section 2218 is unconstitutional under the *Zschernig* rule. Without any evidence whatever as to how Section 2218 has been applied in this case, we are unable to say that it has been applied in such a way as to interfere with the foreign relations of the United States. We interpret the Supreme Court's

recent ruling denying a rehearing in *Ioannou* as at least an indication that evidence of improper application of the statute is necessary.

We appreciate that the Supreme Court may eventually go further than it has thus far gone and that it may eventually hold that all benefit, use and control statutes are invalid regardless of how the state courts have applied them. But we conceive it to be our duty to enforce the law as it is, not as it may be in the future.

Accordingly, the motion for summary judgment is denied.

So ordered.

IRVING R. KAUFMAN,
U. S. C. J.

EDWARD C. McLEAN,
U. S. D. J.

CHARLES TENNEY,
U. S. D. J.

Dated: December 18, 1968

Joseph A. Cox et al.

APPEAL from the United States District Court for the Southern District of New York.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is placed on the summary calendar.

April 28, 1969

Supreme Court of the United States

No. 1146 ---- , *October Term, 19* 68

Anghel Goldstein aka Andrei Pietraru,
et al.,

Appellants,

v.